IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MONTY BRACK
Plaintiff

V. NO. 3:93CV180-B-A

LINKOUS CONSTRUCTION CO., INC.,
WESTINGHOUSE ELECTRIC CORP., and
ALLEN & HOSHALL, INC.

MEMORANDUM OPINION

This cause comes before the court upon the motion to dismiss of the defendant Westinghouse Electric Corporation (hereinafter "Westinghouse") and the motions for summary judgment of the defendants Westinghouse and Allen & Hoshall.[1] The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The defendant Westinghouse Electric Corporation (hereinafter "Westinghouse") hired the defendant Linkous Construction Company (hereinafter "Linkous") to construct a distribution center on a parcel of Westinghouse property in Byhalia, Mississippi. The architectural firm Allen & Hoshall, who is also a defendant, was hired to plan and oversee the construction of the facility. The plaintiff was employed by Fischer Steel Corporation, a sub-contractor hired to construct certain ironworking portions of the building.

[1] The defendant Linkous Construction Company has settled with the plaintiff, leaving Westinghouse Electric Corporation and Allen & Hoshall as the only remaining defendants.

The plaintiff was injured when the steel beam upon which he was working collapsed and fell to the ground. The beam was laid across at least two columns, including a column designated as C-6. The plaintiff has alleged that the anchor bolts in the footing to column C-6 were damaged, and that the replacement anchor bolts were improperly secured to the footing, causing column C-6 to fall. The plaintiff has further alleged that column C-6 was nearly a foot shorter than it should have been, which may have contributed to the accident.

The plaintiff has alleged negligence in general terms against all of the defendants collectively. The plaintiff has further alleged in the alternative that Linkous committed an intentional act by failing to repair and then concealing a dangerous condition which it knowingly created by its installation and repair of the anchor bolts to which column C-6 was attached.

MOTION TO DISMISS

Westinghouse has moved to dismiss the plaintiff's complaint for failure to state a claim. Westinghouse argues that the owner of a parcel of land who has contracted with separate entities to plan and build a structure on its premises contracts away the duties relating to construction. Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 185 (Miss. 1989). Stated differently, Westinghouse asserts that the owner of land is not vicariously liable for the negligence of an independent contractor. Mississippi Power Co. v. Brooks, 309 So. 2d 863, 866 (Miss. 1975). While Westinghouse accurately states the law regarding liability

for the negligence of another, it should be noted that an owner of land remains liable for his own negligence. Id. Furthermore, an owner of land may be liable for the negligence of another if the owner maintains control over those features of the work out of which the injury arose. Magee, 551 So. 2d at 186. The plaintiff has alleged in his complaint that Westinghouse was directly negligent. Since an owner of land is liable for his own negligence, the court finds that the defendant's motion to dismiss should be denied.

MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

A. Westinghouse

The plaintiff has asserted two theories of liability against Westinghouse--direct negligence and vicarious liability. While an owner of land is liable for his own negligence, the plaintiff has failed to provide any evidence that the defendant Westinghouse breached any duty owed to the plaintiff. The only dangerous condition or negligent activity which the plaintiff has asserted concerns the condition of the anchor bolts and the length of column C-6. The plaintiff has offered no evidence linking Westinghouse to either the bolts or the length of the column. Furthermore, the plaintiff's own expert witness fails to implicate Westinghouse in any manner.

As for the theory of vicarious liability, the contract called for the contractor, Linkous, to be responsible for assuring that all work was performed with due regard for safety. As aforementioned, an owner of land is not vicariously liable for the negligent acts of the independent contractor or the independent contractor's employees, which are committed in the performance of the contract. Magee, 551 So. 2d at 185; Brooks, 309 So. 2d at 866.

The possible exception mentioned in Magee applies only if the owner maintained control over the specific aspect of the construction which caused the injury. Magee, 551 So. 2d at 186. The plaintiff has failed to produce any evidence that Westinghouse maintained control over the repair of the damaged anchor bolts or the length of column C-6. The plaintiff has produced minutes from a meeting in which a Westinghouse representative asked if "anchor bolts had been verified." A Linkous representative assured him they had. There is no other reference to anchor bolts in the minutes and no indication that the Westinghouse representative's comment referred in any manner to the bolts at column C-6. Such a vague inquiry does not rise to the level of showing control over the repair of the footing and the installment of the replacement anchor bolts.

B. Allen & Hoshall

The plaintiff asserts that the defendant Allen & Hoshall was negligent for failing to issue proper written instructions to Linkous for the repair or replacement of the damaged anchor bolts, failing to see that their instructions were carried out, and failing to warn other subcontractors and their employees of the dangerous condition resulting from the improperly repaired footing. When the defendant pointed out that it had no knowledge the anchor bolts had either been damaged or negligently repaired, the plaintiff responded by stating that the defendant had a duty to know of the damage and subsequent replacement of the bolts. However, the plaintiff has failed to offer any evidence tending to prove that the defendant had an opportunity to discover the damaged

anchor bolts. The plaintiff's own expert testified that he had no knowledge of the amount of time between the damage to the anchor bolts and the attempted repair of the footing, and that it would only take a matter of minutes to replace the damaged bolts. He further testified by affidavit that once the footing was repaired, even in the allegedly negligent manner present in this action, even an expert would not be able to notice that the repair was defective. It is conceivable that within minutes of the damage to the anchor bolts the footing was repaired in such a manner that one could not determine the sufficiency of the repair. The plaintiff has failed to offer any evidence that suggests otherwise. The court finds that the defendant had no duty to watch every act of every employee on the job site. If Allen & Hoshall was not notified of the damaged bolts, then they cannot be held liable for any negligent repair. The worker who failed to tell the appropriate party of the damage may be negligent, and his employer vicariously liable, but no liability attaches to Allen & Hoshall, absent some showing that they were notified of the dangerous condition. The plaintiff has failed to make such a showing.

The plaintiff has also asserted that column C-6 was nearly a foot shorter than the other columns, thus contributing to the collapse of the beam. However, the plaintiff has failed to offer sufficient testimony to survive summary judgment on this issue. The plaintiff's expert testified that it was impossible to say that the length of the column contributed to the fall in any certain amount, but that it is <u>possible</u> that the allegedly shorter length

contributed a percentage. Testimony that a condition possibly caused an injury is not legally sufficient to withstand summary judgment. See Fowler v. State, 566 So. 2d 1194, 1200 (Miss. 1990); Gulf Ins. Co. v. Provine, 321 So. 2d 311, 314 (Miss. 1975).

The plaintiff further asserts that Allen & Hoshall was negligent in giving Linkous improper instructions for the repair of other footings with damaged anchor bolts. The evidence shows that other bolts had been damaged prior to the bolts at column C-6, and the defendant instructed Linkous to replace the damaged bolts with 3/8" bolts, set in holes 10" deep. When Linkous or one of the subcontractors repaired the footing at column C-6, they set the new bolts in holes 4" to 6" deep. The plaintiff argues that the bolts set in holes 10" deep were not properly secured because of a failure to use threaded bolts with heads and washers. Since the person who replaced the bolts at column C-6 was supposedly following the previous instructions, the plaintiff maintains that Allen & Hoshall is negligent for failing to give proper instructions for the repair of other damaged footings. However, the other bolts that were replaced had nothing to do with the collapse of the column and beam at C-6 and therefore any guidance the defendant gave in regards to the other bolts is irrelevant to this action. Further support for the lack of relevance of the previous instruction is the fact that the person who repaired the footing at C-6 failed to follow the instructions previously set forth by the defendant for the replacement of other damaged bolts.

The plaintiff has failed to show that Allen & Hoshall had any knowledge of the damaged anchor bolts at column C-6 or gave any instructions as to the repair of the C-6 footing. The plaintiff cannot maintain their action against Allen & Hoshall without producing some evidence of either knowledge or negligent instruction. The plaintiff has offered expert testimony to the effect that Allen & Hoshall had a duty to know of any problems that arose at the construction site. However, the existence of a duty is a question of law rather than fact. While the nature of the relationship between the parties may be a question of fact, the duties that accompany said relationship is ultimately a question of law. The plaintiff has cited no cases which indicate that an architectural firm hired to plan and oversee the construction of a building has any duty to know of all problems which arise on the job site. The architectural firm's duty is limited to the duty to exercise reasonable care, and the plaintiff has presented no evidence tending to show that Allen & Hoshall breached this duty.

CONCLUSION

For the foregoing reasons, the court finds that the defendant Westinghouse's motion to dismiss should be denied, the defendant Westinghouse's motion for summary judgment should be granted, and the defendant Allen & Hoshall's motion for summary judgment should likewise be granted.

An order will issue accordingly.

THIS, the _____ day of October, 1995.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE